National Labor Relations Board



Weekly Summary of NLRB Cases

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Adult Residential Care, Inc. and Flushing Assn. in Transitional Housing, Inc., a/k/a F.A.I.T.H., its Successor (7-CA-40701; 344 NLRB No. 101) Flushing, MI June 13, 2005. The Board granted the Respondent's motion and dismissed the complaint based upon an unfair labor practice charge filed against the Respondent by Charging Party AFSCME. [HTML] [PDF]

On Feb. 25, 1994, AFSCME filed unfair practices charges against the Respondent, a group home provider, and the State of Michigan with the Michigan Employment Relations Commission (MERC). On March 31, 1997, the Michigan legislature amended its Public Employee Relations Act to exempt residential care workers from being classified as Michigan state employees and under MERC jurisdiction. MERC dismissed the underlying case on Nov. 10, 1997, citing lack of jurisdiction due to preemption, as the practices at issue were arguably subject to the NLRA and there had been no showing that the Board would decline to exercise jurisdiction.

The Board held that the Charging Party should have known by March 31, 1997, at the very latest, that MERC clearly lacked jurisdiction and that the Charging Party's proceedings before MERC would be dismissed. Accordingly, the Charging Party should have filed its charges with the Board in a timely manner, the Board wrote. It did not do so until Feb. 1998 or nearly 11 full months later—almost double the time provided by Section 10(b).

The Board explained that it need not decide whether the Charging Party should have known at an even earlier date that MERC lacked jurisdiction. It said arguably that the date, among others, is July 28, 1995, when the Board, in *Management Training Corp.*, 317 NLRB 1355 (1995), reversed the discretionary jurisdictional standard of *Res-Care, Inc.*, 280 NLRB 670 (1986), and established a new test for determining whether to assert jurisdiction over employers that provide services to or for an exempt entity. The Board noted also that the Michigan Court of Appeals decided on Jan. 12, 1996, that there was no longer a sufficient showing that the Board would refuse to assert its jurisdiction in group home cases and that MERC no longer had jurisdiction on grounds of Federal preemption. *State County Employees AFSCME v. Dept. of Mental Heath (Quality Living Systems)*, 545 N.W.2d 363 (Mich. Ct. App. 1996), a consolidated case which included the Respondent and the Charging Party.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by State County Employees AFSCME. Parties waived their right to a hearing before an administrative law judge.

Alternative Services, Inc. (7-CA-40702; 344 NLRB No. 99) Livonia, MI June 13, 2005. The Board granted the Respondent's motion and dismissed the complaint based upon an unfair labor practice charge filed against the Respondent by Charging Party AFSCME. [HTML] [PDF]

On May 19, 1994, AFSCME filed unfair practices charges against the Respondent, a group home provider, and the State of Michigan with the Michigan Employment Relations Commission (MERC). At the time, the Board applied a discretionary jurisdictional standard over private employers receiving government funding. *Res-Care, Inc.*, 280 NLRB 670 (1986).

After AFSCME filed its charges with MERC, the Board issued *Management Training, Inc.*, 317 NLRB 1355 (1995), reversing the *Res-Care* discretionary jurisdictional standard and establishing that the Board's new test for asserting jurisdiction was solely whether the employer met the definition of "employer" under Section 2(2) and met the applicable monetary jurisdictional standard. The Board did not address whether it would retroactively apply its new jurisdictional standard.

On March 31, 1997, the Michigan legislature amended its Public Employee Relations Act to exempt residential care workers from being classified as Michigan state employees and under MERC jurisdiction. MERC dismissed the underlying case on November 10, 1997, citing lack of jurisdiction.

Turning to the Respondent's motion to dismiss, the Board noted that it has never held—nor has it previously been asked to decide—whether the doctrine of equitable tolling applies to a situation where, as here, a charging party excusably does not know of the existence of a cause of action before the Board and timely files charges in a non-Board state forum which, at the time of the filing, had competent jurisdiction over the matter. It wrote:

"Assuming, arguendo, that the doctrine of equitable tolling applies in this circumstance, we hold that it does not excuse the failure of the Charging Party to file the instant charges with the Board until February 1998. The doctrine requires the exercise of reasonable diligence on the part of a charging party." The Board held that the Charging Party should have known by March 31, 1997, at the very latest, that MERC clearly lacked jurisdiction and that the Charging Party's proceedings before MERC would be dismissed. Accordingly, it decided that the Charging Party should have filed its charges with the Board in a timely manner thereafter and granted the Respondent's motion to dismiss the complaint in light of the delay.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by State County Employees AFSCME. Parties waived their right to a hearing before an administrative law judge.

KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa (32-CA-20417, 20433; 344 NLRB No. 105) Berkeley, CA June 16, 2005. Affirming the administrative law judge's recommendations, the Board held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize or deal with Leslie Fitzgerald as a union representative for unit employees and by denying Fitzgerald access to the facility in order to perform her collective-bargaining duties. [HTML] [PDF]

The Board determined that under the principles set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the Respondent violated Section 8(a)(1) by its February 7, 2003 issuance and subsequent maintenance of a rule prohibiting "negative conversations" about

associates or managers. The judge found that the Respondent did not cure the illegality by its later communication to employees as it failed to meet the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In agreeing with the judge that the Respondent did not cure its unlawful conduct, Chairman Battista and Member Schaumber did not pass on all aspects of *Passavant*. Member Liebman agreed with the judge's analysis concerning the rule's illegality and the failure of the Respondent's subsequent notice to satisfy the requirements of *Passavant*.

There were no exceptions to the judge's ruling granting the General Counsel's motion to strike Respondent's erratum to its posthearing brief. Chairman Battista and Member Schaumber noted that in ruling on the motion, the judge cited *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002), for the proposition that "excusable neglect" justifying untimely filing of documents "requires extenuating circumstances rather than a mistake." In their view, the holding in *Unitec Elevator* was more limited: "the miscalculation of a filing date, absent a showing of extenuating circumstances does not constitute excusable neglect" under the Board's Rules and Regulations. 337 NLRB at 426.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Hotel & Restaurant Employees Local 2850; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland, Sept. 4-5, 2003. Adm. Law Judge Mary Miller Cracraft issued her decision Nov. 28, 2003.

Electrical Workers (IBEW) Local 48 (36-CB-1798-1, et al.; 344 NLRB No. 102) Portland, OR June 13, 2005. The Board granted in part and denied in part the Respondent's motion for reconsideration, rehearing, and reopening of the record of the Board's earlier decision reported at 342 NLRB No. 10 (2004). It granted the motion to correct the Board's factual findings as to (1) the date when the short-call limit was lengthened to 30 days and, consequently (2) the duration of the short-call limit during the relevant period. The motion was denied in all other respects because the Respondent did not demonstrate extraordinary circumstances warranting reconsideration, rehearing, or reopening of the record as required by Section 102.48(d)(1) of the Board's Rules and Regulations. [HTML] [PDF]

In the previous decision, the Board found: a "short-call" is a job that lasts less than a specified period of time; registrants dispatched to short-call jobs out of the Respondent's hiring hall retain their predispatch position on the out-of-work list (OWL) when those jobs end; and if a job exceeds the short-call time limit, the registrant loses his positions and "rolls" to the bottom of the OWL. The Board found that during the relevant period, October 1992 to May 1994, the short-call rule specified a 40-hour limit, and if a job lasted more than 40 hours, the registrant was supposed to "roll."

As contended by the Respondent, the Board should have found that the short-call limit was lengthened from 40 hours to 30 days effective September 1992 and not November 1994. Accordingly, it withdrew the short-call findings, together with other findings in the earlier decision dependent on those facts.

Chairman Battista and Member Schaumber reaffirmed their earlier finding that the Respondent's failure to police book 1 registrations, which enabled numerous book 1-ineligible applicants to receive dispatches that should have gone to applicants properly registered on book 1, constituted gross negligence and therefore violated Section 8(b)(1)(A) of the Act.

Although Member Liebman did not participate in the original decision, she agreed that its mistaken short-call findings should be corrected. However, she disagreed with her colleagues' conclusion that the remaining mistaken departures from the hiring hall rules nevertheless violated the Act. In her view, the Respondent's honor system for signing book 1 was not so far outside a "wide range of reasonableness" as to breach the duty of fair representation. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

(Chairman Battista and Members Liebman and Schaumber participated.)

King Soopers, Inc. (27-CA-16934, 17102; 344 NLRB No. 103) Denver, CO June 17, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish and delaying furnishing certain information to PACE Local 5-920 concerning unit employees, including postings and bids for the "floater pool" and management notes and security reports taken in connection with investigations of employees' alleged violations of work rules. [HTML] [PDF]

Chairman Battista and Member Schaumber affirmed the judge's recommended order, disagreeing with Member Liebman's suggestion that a broad cease-and-desist order is appropriate. They noted that neither the General Counsel nor the Charging Party has excepted to the judge's failure to grant a broad cease-and-desist order. Chairman Battista and Member Schaumber further relied on the considerations cited in *King Soopers, Inc.*, 344 NLRB No. 104 (2005), where they denied the General Counsel's request for a broad cease-and-desist order against the Respondent. As to the general matter of broad orders, the respective views of Chairman Battista and Member Schaumber are set forth in that opinion.

Member Liebman would grant a broad cease-and-desist order under *Hickmott Foods*, *Inc.*, 242 NLRB 1357 (1979). Based on the violations found in this proceeding, and the violations found in other proceedings before the Board, she would conclude that the Respondent has demonstrated a proclivity to violate the Act.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by PACE Local 5-920; complaint alleged violation of Section 8(a)(5). Hearing at Denver, Feb. 21-22, 2001. Adm. Law Judge James L. Rose issued his decision May 22, 2001.

King Soopers, Inc. (27-CA-16902-1, et al.; 344 NLRB No. 104) Colorado Springs, CO June 17, 2005. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish Food & Commercial Workers Local 7 necessary and relevant information concerning bargaining unit employees. This case arose from information requests by the Union concerning (1) a grievance filed by the Respondent against the Union and (2) the Respondent's reopening of store #53. [HTML] [PDF]

Regarding the first issue, the Board agreed with the judge that the Respondent unlawfully refused to furnish requested financial information that was relevant to the Union's defense against the grievance. It also found that the Respondent unlawfully refused the Union's request for a copy of the letter of understanding upon which the Respondent in part based its grievance (the Behlke-Mercer agreement), and other nonfinancial information concerning the Respondent's grievance.

As for the request for information concerning the opening of store #53, the Board affirmed the judge's finding that the Respondent refused to furnish certain items, but it also found, contrary to the judge, that the Respondent unlawfully failed to provide the requested timecards of employees from other stores who worked at store #53 during the week of that store's reopening. The Union had filed a grievance, alleging that the Respondent failed to apply article 10 of the parties' collective-bargaining agreement in scheduling employees to work at store #53 during the week it reopened.

Chairman Battista and Member Schaumber agreed with the judge that a broad cease-and-desist order is not warranted because the Respondent has not demonstrated a proclivity to violate the Act. They noted that the Respondent's unfair labor practices found here and in *King Soopers, Inc.*, 344 NLRB No. 103 (2005), involve refusals to provide requested information. In support of their ruling, Chairman Battista and Member Schaumber wrote that the Respondent has contracts with at least five unions representing thousands of employees at over 60 stores in Colorado, processes at least 900 grievances annually, and, as the judge noted, complies with virtually all of the many information requests made with regard to those grievances.

Member Liebman, unlike her colleagues, would grant a broad cease-and-desist order under *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Based on the violations found here and in other proceedings before the Board, she would find that the Respondent has demonstrated a proclivity to violate the Act.

Chairman Battista believes that the test of *Hickmott*, properly applied, is consistent with the Supreme Court's decision in *Express Publishing Co.*, 312 U.S. 426 (1941), and with Section 10(c) of the Act. In his opinion, the Board has the power to issue broad orders but that

power should be exercised sparingly, and then only in the most egregious cases. He does not believe that this is such a case.

Member Schaumber noted that the Board's decision in *Hickmott* was in response to the Supreme Court's decision in *Express Publishing*, in which the Supreme Court admonished the Board for issuing an order restraining "any" violation of the Act; the Board's "broad order." He wrote that the *Hickmott* standard has not been met here.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food & Commercial Workers Local 7; complaint alleged violation of Section 8(a)(5). Hearing at Denver, Feb. 20-21, 2001. Adm. Law Judge James L. Rose issued his decision May 22, 2001.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Amcast Automotive of Indiana, Inc. (an Individual) Gas City, IN June 16, 2005. 25-CA-29199; JD-44-05, Judge Ira Sandron.

Heartland Industrial Partners, LLC and Steelworkers (Individuals) Greenwich, CT June 16, 2005. 34-CE-9; JD(NY)-23-05, Judge Raymond P. Green.

Laborers' Eastern Region Organizing Fund (The Ranches at Mt. Sinai and Concrete Structures, Inc.) Mt. Sinai, NY June 14, 2005. 29-CC-1422, 29-CP-662; JD(NY)-22-05, Judge Steven Davis.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Carlstone Corp., Brooklyn, NY, 29-RC-10264, June 13, 2005 (Chairman Battista and Members Liebman and Schaumber)

Multi-Cast Corp., Wauseon, OH, 8-RC-16688, June 13, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION [that Regional Director open and count ballots]

Nationwide Fire & Security, Inc., Tulsa, OK, 17-RC-12301, June 14, 2005 (Chairman Battista and Members Liebman and Schaumber)

(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Turner Industries Group, LLC., Baton Rouge, LA, June 15, 2005 (Chairman Battista and Members Liebman and Schaumber)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Accurate Electric Construction, Inc..., Reynoldsburg, OH, June 15, 2005
(Chairman Battista and Members Liebman and Schaumber)

Bimbo Bakeries, USA, Inc., Abilene, TX, 16-RC-10643, June 15, 2005
(Chairman Battista and Members Liebman and Schaumber)

Durham School Services, Inc., Hayward, CA, 32-RD-1477, June 15, 2005
(Chairman Battista and Members Liebman and Schaumber)

Metaldyne Corp. Driveline Group, Shaft & Precision Forming Minerva Plant,
Minerva, OH, 8-RD-2017, June 15, 2005 (Chairman Battista and Members Liebman and Schaumber)

Miscellaneous Board Orders

ORDER [amending decision to permit the product verification laboratory employees to vote under challenge and denying request for review in all other respects]

Collins and Aikman d/b/a JPS Automotives, Americus, GA, 10-RC-15503, June 15, 2005 (Chairman Battista and Members Liebman and Schaumber)

ORDER [granting request to withdraw petition]

- Advocate-Health & Hospitals Corp. d/b/a Lutheran General Hospital, Park Ridge, IL, 13-RC-20426, June 13, 2005 (Chairman Battista and Members Liebman and Schaumber)
- Adventist Glenoaks Hospital, Glendale Heights, IL, 13-RC-21289, June 14, 2005 (Chairman Battista and Members Liebman and Schaumber)

ORDER [denying motion to dismiss or to reopen record]

Atlas Mechanical, Inc., Las Vegas, NV, 28-RC-6374, June 14, 2005 (Chairman Battista and Members Liebman and Schaumber)

ORDER [denying request for special permission to appeal Regional Director's decision]

Total Health Home Care Corp., Havertown, PA, 4-RC-21021, June 14, 2005 (Chairman Battista and Members Liebman and Schaumber)
